

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel, )  
W.A. DREW EDMONDSON, in his )  
capacity as ATTORNEY GENERAL )  
OF THE STATE OF OKLAHOMA, )  
et al. )  
Plaintiffs, )  
V. ) No. 05-CV-329-GKF-SAJ  
TYSON FOODS, INC., et al., )  
Defendants. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FEBRUARY 19, 2008

PRELIMINARY INJUNCTION HEARING

VOLUME I

BEFORE THE HONORABLE GREGORY K. FRIZZELL, Judge

APPEARANCES:

For the Plaintiffs: Mr. Drew Edmondson  
Attorney General  
Mr. Robert Nance  
Mr. Daniel Lennington  
Ms. Kelly Hunter Burch  
Mr. Trevor Hammons  
Assistant Attorneys General  
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1 being overapplied and are needed for plant growth.

2 THE COURT: Well, but here they're focusing on E. coli  
3 and bacteria, not on phosphorus; correct?

4 MR. RYAN: I'm sorry, Your Honor?

5 THE COURT: In this proceeding are they not focusing  
6 on bacteria as opposed to phosphorus?

7 MR. RYAN: Yes, Your Honor. No, that's absolutely  
8 right, but we're talking about what the land needs and what's  
9 being overapplied.

10 THE COURT: Right, right.

11 MR. RYAN: I think their argument only goes to the  
12 phosphorus, to the one element of phosphorus. It does not  
13 address the other twelve elements which I say are needed for  
14 plant growth and are beneficial to the crops and plants and  
15 pastures and forage. And I don't think there's any question  
16 but that there has been an overapplication of litter on some or  
17 many farms. That's not an issue in our book. I'm certainly  
18 not arguing that in terms of phosphorus.

19 Your Honor, these are the defendants, there's 13 of  
20 them. They're in seven, if you will, if you disregard  
21 affiliated companies, there's seven companies. The plaintiffs  
22 want to treat us as if we were one homogenous group. And if  
23 they can show that the defendants, plural, apply bacteria  
24 somehow to the waterways and that makes all the defendants  
25 liable. These defendants are competitors of one another, Your



1 two constituents, one, of course, is bacteria and the other is  
2 phosphorus. We admit -- we also have the admission by the  
3 defendants in their opening that there has been an  
4 over-application of poultry waste with respect to phosphorous.  
5 We have Dr. Johnson's testimony where he discusses that high  
6 level of P's. A high level of phosphorus indicates disposal  
7 and that poultry waste is not a good balanced fertilizer and  
8 that poultry waste is not being used as a soil conditioner, an  
9 amendment. So to wrap up on our solid waste point again,  
10 animal manures are not exempt from the express statutory  
11 language and poultry waste is discarded within the definition  
12 of solid waste.

13 Turning now to contributor liability which is our next  
14 point. Contribute means to have a part or share in producing  
15 an effect. And one doesn't actually have to handle or dispose  
16 of the waste to be a contributor. Explicit control is not  
17 required to be a contributor. It's not necessary to have  
18 ultimate control over the decisions concerning waste handling  
19 to be a contributor. The simple fact of the matter is that the  
20 contributor liability is construed more liberally than the  
21 common law counterparts.

22 So we presented to the Court in the course of the  
23 testimony that the defendants are indeed contributors. We've  
24 demonstrated that they generate massive amounts of poultry  
25 waste in the IRW. That was Dr. Engel. We've demonstrated that

1 this Court following the trial of the case-in-chief next year.

2 The testimony this Court has heard that the growers  
3 can maintain that litter within the houses for one to three  
4 years. And also the Court is aware that a moratorium was  
5 entered in the Eucha-Spavinaw Watershed that lasted 18 months.  
6 There is evidence before the Court that the beneficial impact  
7 of such an order would be immediate and that within a year,  
8 remediation from this source, this primary source would be  
9 complete. Thank you, Your Honor.

10 THE COURT: Thank you. Mr. Overton, how much time?

11 THE CLERK: He has 13 minutes left.

12 THE COURT: Thank you, sir. Mr. George.

13 MR. GEORGE: Thank you, Your Honor. Your Honor, I'll  
14 give the Court a warning that I did something last night that I  
15 rarely do which is actually rehearse my closing and in the  
16 process --

17 THE COURT: Your poor wife.

18 MR. GEORGE: I know. She closed the door and asked me  
19 to go someplace else. But, Your Honor, I'm going to speak  
20 quickly and I apologize in advance to the court reporter. I  
21 have a lot that I want to get in.

22 THE COURT: Yes, sir.

23 MR. GEORGE: But before, Your Honor, I get to the  
24 prepared remarks that I have and then the substance of the  
25 argument, I want to address something that Mr. Baker said with

1 regard to what I think he interpreted as an admission in  
2 opening related to what he referred to as over-application of  
3 phosphorus. I just want to make sure the record is clear.  
4 What Mr. Ryan said during opening was that to the extent  
5 applying phosphorus above the agronomic rate of phosphorus is  
6 over-application, that has occurred in this watershed. And the  
7 reason for that, Your Honor, is very simple. The plans issued  
8 by the State of Oklahoma permit that to occur. In fact, they  
9 direct growers in terms of where they can land apply and the  
10 amounts. And those plans are not based on a strict agronomic  
11 rate. So I want to make sure there's no confusion in the  
12 record in terms of what was said.

13 Your Honor, sometimes your opponent can sum things up  
14 better than you can. And as I listened to Mr. Bullock's  
15 cross-examination late in the day yesterday of Dr. Banner, he  
16 invoked Carl Sagan. And the point was one that I completely  
17 agree with and I think is applicable and that is that the  
18 absence of proof does not prove anything. And Your Honor, I  
19 think that squarely applies to what has been presented by the  
20 Attorney General during the two weeks of this hearing.

21 What we have seen, Your Honor, is an attempt to put  
22 spin on water quality data and water quality standards.  
23 There's a claim that an emergency exists in the Illinois River  
24 Watershed but the Attorney General has come forward with no  
25 proof whatsoever that the water in this watershed is any